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Current Decisions in Constitutional Law

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Raucous Noises, Snakes, Compulsory Vaccinations and the Personal Freedoms

The persistent problem of drawing the line between governmental power and personal liberty still remains. It is exemplified in the current decision, *Kovacs v. Cooper,* 69 S. Ct. 448. This case considered the validity of a municipal ordinance which made it unlawful to use "any device known as a sound truck, loud speaker or sound amplifier . . . which emits therefrom loud and raucous noises," in the streets or public places of the town.

Defendant was found guilty of violating the ordinance and contended that the ordinance violated the 14th Amendment by suppressing his rights of freedom of speech. It appears that the appellant used the sound apparatus to comment on a labor dispute. The court held that the ordinance was not so indefinite or vague as to violate due process; that the ordinance did not establish a "previous restraint" on free speech.

The restriction here is not upon communication of ideas but upon a method of broadcasting in a loud and raucous manner in a way that would be dangerous to traffic. Justice Jackson concurred but construed the ordinance as forbidding all sound trucks. Justices Black, Douglas and Rutledge dissented on the ground that the appellant was not convicted of operating a sound truck that emitted "loud and raucous noises."

We are perplexed whether under this decision the exercise of police power may forbid the use of any sound truck on the streets for disseminating ideas that are not commercial. The case must be compared with the others, particularly those involving Jehovah's Witnesses, where the court tries to balance the freedom to communicate ideas with the need for order. Compare *Murdock v. Pennsylvania,* 63 S. Ct. 870; *Cox v. New Hampshire,* 61 S. Ct. 762; *Chaplinsky v. New Hampshire,* 62 S. Ct. 766; *Martin v. City of Struthers,* 63 S. Ct. 862.

The religious beliefs espoused by people, though they might seem incredible or preposterous, have yet been protected under the Constitution. However, the Supreme Court of North Carolina recently grafted another exception to this preferred position accorded religious conscience. In *State v. Massey and Bunn,* — N.C. — 51 SE 2d, 179, an ordinance prohibited the handling of poisonous snakes where it endangered public health and safety, the snakes to be destroyed when found to be venemous. The defendants handled these reptiles without injury to themselves or others at services in their tabernacle. They contended that they exorcised unique supernatural powers resulting from their re-

ligious beliefs, that they were commanded to demonstrate these powers, and that to extract the poison of the reptiles would defeat their purposes. Hence, the ordinance infringed upon their religious freedom. Nevertheless, the court held that public safety was superior to the defendants' religious practice and the defendants were guilty of violating the ordinance.

In Kentucky the Court of Appeals in the case of *Mosier v. Barren County Board of Health,* 215 SW 2d 957, held that a father's religious belief against vaccination could not be used to interfere with resolutions requiring school children to be vaccinated for smallpox or else excluded from the city schools. The health of the community could not be endangered by such religious convictions, and, as a condition of attending school, society could require a child to be vaccinated. The decision is not novel. Religious belief has not excused polygamy nor the failure to call a physician for a minor nor other overt acts deemed anti-social. Yet, how far belief has been protected can be seen in the case involving the great "I Am" movement. *U. S. v. Ballard,* 64 S. Ct. 882.

For further decisions involving freedom of speech which have arisen with respect to labor problems, note might be taken of *Sax v. NLRB,* 171 F2d 769. Following a walk-out, a striker spoke to a supervisor at the plant. The supervisor asked her "whether she was for the union" and when she said she was, he questioned her as to her reasons therefor. On another day another striker was asked, "why didn't you come to us if you wanted to have a union." The court held that these were merely perfunctory innocuous remarks which standing alone did not constitute an unfair labor practice and which were within the protection of free speech under the First Amendment.

Political Rights and Immunities

The whole question of the relationship to the legislative function of the congressional power to investigate, to attack witnesses, and to punish for contempt is in process of re-formulation. The lower Federal courts have so far found few constitutional limitations.

In *Dennis v. United States,* 171 F. 2d 986, the United States Court of Appeals reconsidered the validity of the House Committee on Un-American Activities. Following the Josephson, Barsky and Eisler cases, it held that the creation of the Un-American Activities Committee and the matters entrusted to it for investigation were constitutional and lawful. Once having established that the committee was within the constitutional powers of Congress, the logic flowed relentlessly. It was not for the court to consider the wisdom of the act or the propriety of the procedure of the committee unless it had violated the authority Congress had committed to it. The appellant, Dennis, volunteered to appear before the committee. He then refused to answer certain questions as to where and when he was born. A subpoena was thereupon served upon him. He was indicted and convicted for wilful default in not answering this subpoena. The court held that his voluntary appearance did not exempt him from subsequent subpoenas and that a statement which he sent to the committee was not a response to the subpoena.

Economic Regulation vs. Due Process and Equal Protection

The extension of the power of government in the economic field, involving regulations and prohibitions in all sorts of activities, seems to expand notwithstanding due process and equal protection as shown by the following current cases.

Daniel v. Family Security Life Insurance Company, 69 S. Ct. 550. A South Carolina statute prohibiting life insurance companies and their agents from operating an undertaking business, and undertakers from serving as agents of life insurance companies, was held not arbitrary or unrelated to the elimination of an evil so as to deny due process of law, although only one company was affected by the statute. The rule of a former case was argued: "A State cannot, under guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupation . . ." 49 S. Ct. 57. The court said, "We cannot say that the statute has no relation to the elimination of evils. There our inquiry must stop."

On the other hand a Supreme Court in New York in the case of *People ex rel Pinello v. Leadbitter,* 85 N.Y. S.2d 287, could see no reasonable relationship between the exercise of the police power for promoting or preserving public health and welfare and an ordinance which provided that barber shops and hairdressing establishments should remain open only during certain hours, from 8:30 A. M. to 6:30 P. M. One wonders whether the deference or lack of deference to legislative judgment in these two cases is based upon the field wherein the regulation is sought.

In *Railway Express Agency v. People of State of New York,* 69 S. Ct. 463, the appellant was in the express business, operated many trucks, and sold space on the exterior side of these trucks for advertising. That advertising was unconnected with its own business. It was convicted in the Magistrate's Court and fined. The charge was violation of a traffic regulation which provided that no person shall use a vehicle for advertising except where the advertising is related to the usual business of the owner of the vehicle. The New York court concluded that advertising on vehicles constitutes a distraction to drivers and pedestrians and therefore affects the safety of the public in the use of the streets. The Supreme Court held that it could not say this regulation had no relationship to the traffic problems of New York. In answer to the argument that equal protection of the laws was violated, the court held that the local authorities may well have concluded that those who advertised their own wares on their trucks do not present the same traffic problem, in view of the nature and extent of the advertising which they use, as those which advertise other peoples' wares; that practically, the classification has a relation to the purposes for which it is made. Justice Rutledge was doubtful on the question of equal protection of the laws.

The New York Court of Appeals in *Court Square Building v. City of New York,* 83 NE 2d 843, held that it was a constitutional exercise of the

police power for the City of New York to control the rents of business establishments. The serious contention of the landlord was that the lease affected had been executed prior to the effective date of the law, which, if applicable, would then constitute a violation against impairing the obligation of contracts. The court answered that the act was prompted by an emergency affecting public welfare, implying that all obligations of contracts are subject to police power. Of course, the rationale springs from *Home Building and Loan Association v. Blaisdell,* 54 S. Ct. 231. Certain powers of government may not be restricted as to their future exercise by contracts between private parties, even though these contracts were valid when made.

And in *Opinion to the Governor,* 63 A 2d 724, the Supreme Court of Rhode Island sustained a statute which authorized a city to provide housing accommodations notwithstanding precedents that have made the doctrine traditional. (The *Blaisdell* case, *Green v. Frazier,* 40 S. Ct. 499, *Jones v. City of Portland,* 38 S. Ct. 112). The court unnecessarily labors to justify the general power in the government to protect and promote the health and safety of its people. It states that a state or city cannot compete in private business in normal times under normal conditions and seems to justify the power of the state to provide rental housing accommodations upon the acute and distressing emergency. The concept of "public purpose" for taxation or the use of public funds for aiding the inhabitants of a state is an expanding doctrine which has rarely been limited in recent times by the courts.

In Nebraska, the Supreme Court in the case of *Hill v. Kusy,* 35 NW 2d 594, held that an Unfair Sales Act which prohibited retailers or wholesalers from selling or advertising merchandise at less than cost did not violate personal liberty or due process and was not discriminatory This accords with the decisions of other states.

The Trend in Other Fields

In the case of *Lee v. Hercules Powder Co.,* the U. S. Court of Appeals for the 7th Circuit, joins three other Courts of Appeals and many District Courts in sustaining the constitutionality of the Portal-to-Portal Act which terminates these claims except where compensated by contract, custom or practice. . . . The Supreme Court of Arkansas, in *Terry Dairy Products Company v. Beard,* 216 SW 2d 860, holds that an ordinance was not unconstitutional because it required milk distributors to act as collecting agents of inspection fees from milk producers. This accords with those decisions which have made retail merchants the agents of the state in collecting sales tax. It is merely incidental to the regulatory power which is proper. . . . The commerce clause and due process clause are not violated where Louisiana and New Orleans levy an ad valorem tax against foreign interstate carriers. The only problem under the commerce clause is to decide "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions," and due process is based upon whether the tax

has relation to the benefits or protections afforded by the taxing state. . . . In California in the case of *Steiner v. Darby*, 199 P 2d 429, it is held permissible to require from officers and employees of a county an oath of allegiance whether or not they advocate the overthrow of government by force or violence or are members of any organization which advocates this. . . . In the labor field the following cases should be carefully noted: The Wisconsin Employment Peace Act, which makes it an unfair labor practice for an employee to strike, or picket, or participate in such acts, unless a majority in a collective bargaining unit vote to do this, or to interfere with production by stopping work during regular working hours, is held not to invade freedom of speech or assembly. *(International Union UAWAF of L Local 232 v. Wisconsin Employment Relations Board,* 69 S. Ct. 516). . . . On the other hand, in the case of *National Labor Relations Board v. Stowe Spinning Company,* 69 S. Ct. 541, decided on the same day, the court held that an employer who denies a union organizer the use of a meeting hall in a company town, in order to discriminate against the union is guilty of an unfair labor practice and the action of the board prohibiting such a practice does not violate the employer's rights under the 5th Amendment.

Next Institute April 16 on Fair Trade Practices

"Fair Trade Practices—Federal and State" is the subject of the next Denver Bar Association Institute to be held in one of the district court rooms on Saturday morning, April 16 at 9:30 a.m.

It will be a panel discussion with an array of talent that includes Peter J. Donoghue, chief of the Mountain States office of the Anti-Trust Division, S. Arthur Henry, Morrison Shafroth, Joseph G. Hodges, Albert L. Vogl and George Creamer.

No attempt will be made to cover the entire trade regulation field. Rather will the panel stress recent developments in fair trade practices arising out of the Sherman, Clayton, and Robinson-Patman acts in the Federal sphere and the Colorado Unfair Practices Act.

The District Court judges have been most cooperative in making available a forum for the occasion. Post card notice of the specific courtroom in which the institute will be conducted will be sent to Denver association members later. As chairman of the Institute Committee, Charles Beise is in his usual role as chief arranger, ably assisted by Thad Smith who also will serve as one of the moderators for the panel.

Admitted to a Higher Court

During the past month death has claimed Victor W. Hungerford, former mayor of Colorado Springs, and Thomas E. Munson of Sterling. Mr. Munson was a brother and law partner of the late District Judge H. E. Munson.